No. 83-1437

In the

Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNEY, Individually and as Administrator of the Estate of STEVEN CHESNY, deceased,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Rule 68 can be construed in a way which cuts off a civil rights plaintiff's right to § 1988 attorneys fees and imposes liability on such a plaintiff for defendant's fees regardless of the reasonableness of the offer of judgment at the time it was made or the productiveness of the post-offer work of plaintiff's counsel?

2. Whether an offer of judgment which lumps together plaintiff's damages and plaintiff's § 1988 attorneys fees is a valid offer under Rule 68?

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INTEREST OF AMICI*

This case raises the question of whether Federal Rule of Civil Procedure 68 may be applied in a manner which deprives a prevailing civil rights plaintiff of his attorneys fees and make him liable for the attorneys fees of a losing defendant. It also raises the question of whether a Rule 68 offer of judgment may lump together plaintiff's damages and attorneys fees.

The American Civil Liberties Union ("ACLU") and the Roger Boldwin Foundation of the ACLU ("ACLU Illinois") frequently represent civil rights litigants. Indeed, such representation is, in some ways, the central purpose of both organizations. Moreover, the receipt of fee

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* The parties have consented to the filing of this amicus brief. Their written consents have been filed with the Clerk of Court under Rule 36.2 of the Rules of this Court.

awards in successful lawsuits of this type is an important source of funding for both organizations. The construction of Rule 68 proposed by petitioner, in addition to being contrary to the plain meaning of that Rule, would make vigorous enforcement of the civil rights laws by organizations like amici virtually impossible, for it would give civil rights defendants a settlement weapon of such potency as to permit the virtual dictation of settlement terms.

As to the second question raised by this case, whether an offer of judgment combining fees and damages is proper, the course of conduct pursued by this petitioner would, if endorsed by this Court and generally pursued by civil rights defendants, create grave ethical problems for amici and, indeed, for all civil rights attorneys. The problem arises from the fact that § 1988 attorneys

fees are not determinate in amount, but, instead, are normally fixed by the trial judge in a complex balancing process which may raise the fee above or drop it below the attorney's normal hourly rate. Given the inherent uncertainty of this process, an attorney who is asked to evaluate a Rule 68 offer which lumps damages and fees will have a strong incentive to overvalue the fee component of the offer, where his client's interest would favor predominance of the damages component. The procedure followed by these petitioners guarantees that such conflicts will be faced by the ACLU and the ACLU of Illinois in numerous future cases.

Accordingly, for all of the foregoing reasons, the ACLU and the ACLU submit the following brief in support of respondent.

SUMMARY OF ARGUMENT

Petitioners urge this Court to construe Rule 68's use of the term "costs" as including attorneys fees in those cases covered by the provisions of 42 U.S.C. § 1988. This proposed construction is based on the happenstance that § 1988 provides that prevailing civil rights litigants will receive their reasonable fees "as part of costs". Petitioners' position, however, is inconsistent with the plain meaning of Rule 68 and it threatens to gut the effectiveness of § 1988. Additionally, the offer of judgment employed in this case -- an offer which lumped together plaintiff's damages and his fees -- was so indefinite as to be improper for Rule 68 purposes and, in addition, it had the potential to create severe ethical problems for plaintiff-respondent's counsel

I.A. For almost two hundred years since its decision in Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796), this Court has recognized the sharp distinction drawn in the American system between "costs" on the one hand, and attorneys fees on the other. As a result, this Court has consistently construed statutory use of the term "costs" without any further specification to exclude attorneys fees. This distinction between fees and costs is particularly evident and well articulated in the Federal Rules of Civil Procedure. Where the Rules intend to refer to both costs and fees, they do so. E.g., Rules 11, 37. In contrast, where the Rules refer to "costs" simpliciter, they are normally construed as referring to costs exclusive of fees.

Of special significance in this regard is the construction given Rule 54(d). Rule 54(d) provides that a pre-

vailing party will be allowed his or her costs "as of course," a result which Rule 68 was specifically intended to alter when the prevailing party has rejected, and failed to better, an offer of judgment. The framers' understanding of the use of the term "costs" in Rule 54(d), as evidenced by the Notes of the Advisory Committee and the authorities referred to therein, clearly distinguished between Rule 54(d) costs and attorneys fees. This distinction has been preserved in contemporary procedure under the Rule, as is evidenced by the numerous decisions which distinguish between the procedures for assessing Rule 54(d) costs and those for assessing attorneys fees. The distinction between Rule 54(d) costs and § 1988 attorneys fees is further etched with particular clarity by the presumption that costs go to the prevailing party--regardless of whether that be plaintiff

or defendant--as a matter of course. Section 1988 fees are not routinely shifted in this way, and it is well established that a prevailing civil rights defendant must establish that plaintiff's suit was "clearly frivolous, vexatius or brought for harrassment" before he may recover fees from a defeated plaintiff. Hughes v. Rowe, 449 U.S. 5, 14-16 (1980). Thus, Rule 54(d) "costs" cannot be construed as including fees if the rule is to be read harmoniously with Hughes and § 1988.

B. The mere fact that § 1988 states that fees will be assessed in favor of a prevailing party "as part of costs" does not alter the plain meaning of the term as it is used in Rule 68. The "as part of costs" formula was used by Congress for purposes that have nothing to do with the policy of settlement served by Rule 68. Because the same is true of other statutes which award attorneys

fees and characterize them as "part of costs," the construction of Rule 68 urged by petitioners would result in a crazy quilt scheme of fee shifting, and judicial application of the Rule in this manner would comprise precisely the sort of "standardless judicial rulemaking" eschewed by this Court in Roadway Express v. Piper, 447 U.S. 752, 761-762 (1980).

II. In addition to being contrary to its plain meaning, the construction of Rule 68 urged by petitioners would create an insupportable conflict between that Rule and § 1988. The conflict is not required by the policies underlying Rule 68, and it poses serious separation of powers problems.

A. Section 1988 was enacted in order to "ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensely v. Eckerhart, ____ U.S. ____, 103 S.Ct.

1933, 1937 (1983). A construction of Rule 68 which would include § 1988 fees would be wholly contrary to this purpose. Because the Rule applies mechanically -- that is, regardless of whether the rejection of the offer was justified and regardless of whether counsel's post-offer work was productive -- counsel will be forced to risk their compensation on his ability to foresee and accurately predict all of the numerous contingencies that affect any litigation. This problem will be particularly acute where the offer of judgment comes at an early stage in the case, before any serious discovery. Additionally, the fact that Rule 68 makes a plaintiff potentially liable for his opponent's post-offer costs means that civil rights plaintiffs will on petitioners' theory, be exposed to potentially ruinous fee liability for failing to guess right. When faced with any offer of judgment

that has even the remotest possibility of accurately predicting the outcome at trial, civil rights plaintiffs will be virtually compelled to capitulate, and § 1988 will effectively be transformed from a key to the courthouse to a lock barring entry.

B. This result is not demanded by the policy favoring settlement. Prevailing civil rights plaintiffs are only entitled to their "reasonable" attorneys fees. Thus, presumably, an unreasonabl rejection of an offer of judgment which results in little or no productive post-offer work will be a factor considered by a court reviewing a fee petition. This case, however, offers no insight into the significance of such considerations. Here, there has never been any assessment as to the reasonableness of plaintiff's conduct. Thus, for all any-

one knows, plaintiff's rejection of the offer of judgment was perfectly justified and the effort that went into the case after the offer was productive. Accordingly, there is no reason to believe that the policy favoring settlement demands that this plaintiff be denied his post-offer fees.

C. Given this intense and unnecessary conflict between the proposed construction of Rule 68 and the policies underlying § 1988, separation of powers doctrine dictates that Rule 68 be construed in a manner which harmonizes its provisions with Congress' considered decision to implement its policy judgments in the form of § 1988. This Court's authority to formulate rules of practice is derived either from its inherent powers or from the Rules Enabling Act. It is well established that this Court will not exercise its inherent powers in a manner which

upsets Congress' considered decisions in the attorneys fees area. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Similarly, the power delegated to this Court under the Rules Enabling Act must be exercised in a manner "consistent" with Congress' statutes 28 U.S.C. 2071. Accordingly, since the construction of Rule 68 urged by petitioners would put that Rule in conflict with § 1988, that construction must be rejected.

III. In addition to the shortcomings of petitioners' proposed construction of the term "costs," the Court of Appeals should be affirmed for the reason that the offer of judgment made in this case was not proper

A. In order to be valid, a Rule 68 offer of judgment must be sufficiently

determinate to permit the offeree-plaintiff to meaningfully evaluate the likelihood that he will better the offer by pursuing the case to judgment. Where, as here, an offer of judgment combines attorneys fees and damages in one lump sum, the plaintiff will only be able to evaluate to the offer to the extent that he can specify the size of the fee component and thereby determine his net recovery. Section 1988 fees, however, are so indeterminate as to preclude such analysis. Such fees are not fixed by counsel's hourly rate, but are determined on the basis of a complex 12 factor balancing process which is left to the discretion of the trial court and which may result in an award that is above or below the hourly figure. Given this indeterminacy, an offer of judgment which lumps

fees and damages is not suitable for Rule 68 purposes.

B. Moreover, such an offer raises serious ethical problems. Because the plaintiff will look to his attorney to evaluate such an offer of judgment, and because the attorney will always have a strong pecuniary interest in maximizing the fee component of an offer of this sort, tender of such an offer always runs the risk that a conflict of interest will arise. This is not to say that such conflicts are inevitable, and it is not to say that ethical counsel will never be able to resolve them, but it is to say that the <u>risk</u> of insoluble conflicts and less than resolute counsel <u>is</u> inevitable, and that a construction of Rule 68 which invites such ethical dilemmas should be avoided if at all possible.

ARGUMENT

A RULE 68 OFFER OF JUDGMENT CANNOT DESTROY THE RIGHT OF A PREVAILING CIVIL RIGHTS PLAINTIFF TO RECOVER HIS OR HER ATTORNEYS FEES UNDER THE PROVISIONS OF 42 U.S.C. §1988.

Section 1988 of Title 42 entitles prevailing civil rights plaintiffs to recover their "reasonable" attorneys fees. Petitioners herein have argued that this statutory right can be negated by a defendant's shrewd use of the cost-shifting provisions of Federal Rule of Civil Procedure 68. This argument is at odds with the plain meaning of the term "costs" as it is used in Rule 68 and as it has been used by this court for close to two centuries. Further, the construction of Rule 68 proposed by petitioner would unconstitutionally seek to apply this Court's rulemaking authority in a manner which would eviscerate the carefully considered Congressional policy decisions embodied in 42 U.S.C. §1988

without materially enhancing the policies served by Rule 68. Finally, the argument proposes a procedural strategem which introduces such ambiguity into Rule 68 offers as to make them unsuitable to the purposes of the Rule and, in many circumstances, one which creates insuperable ethical problems for plaintiffs' counsel.

I. The Plain Meaning of the Term "Costs" in Rule 68 Precludes Application of that Rule To Shift the Parties' Responsibilities for Attorneys Fees.

Rule 68 provides that a plaintiff who fails to better defendant's formal offer of judgment by carrying a case through to judgment will not be entitled to all of the "costs" normally awarded to "prevailing parties" under Rule 54(d), and, further, that, such a plaintiff will be obligated to pay the post-offer costs incurred by the defendant-offeror. It is petitioner's position that a fortuity of the drafting of § 1988 -- the decision to characterize a fee award

as "part of the costs" -- had the effect of expanding Rule 68's cost-shifting scheme to include the shifting of fees in civil rights cases. This conclusion is inconsistent with Rule 68's plain meaning.

A. The Plain, Longstanding, and Well Litigated Meaning of "Costs" in the American System Does Not Include Attorneys Fees.

Since at least 1796 it has been the consistent view of this Court that "attorneys fees ordinarily are not among the costs that a winning party may recover." Roadway Express v. Piper, 447 U.S. 752, 759, (1980); relying on Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796). Accordingly, this Court has normally had little trouble in recognizing that, whatever else the term "costs" may include, it does not, absent an express statutory provision to the contrary, include attorneys fees. This Court has

specifically so held with respect to the unmodified use of the term in the Lanham Act, 15 U.S.C. §1117, Fleischman Distilling Corporation v. Maier Brewing Co., 386 U.S. 714, (1967), and with respect to its similarly unadorned use in Section 1927 of Title 28, Roadway, at 447 U.S. 757-763.

Against this background, the plain meaning of Rule 68's "cost" shifting provisions is that they apply only to "costs" as that term has been understood for close to two centuries; that is, to costs exclusive of fees. Certainly other provisions of the Federal Rules of Civil Procedure support this conclusion. Thus, where the Rules intend to include attorneys fees among costs or expenses, they specifically so state. E.g., Rules 11, 37(a)(4), 37(b) ("reasonable expenses, including attorneys fees").

In contrast, where the term "costs" is used without any such amplifying language, it has generally been construed as not including fees. Most significantly, this is the case with Rule 54(d), the very provision whose cost allocation formula -- "costs shall be allowed as of course to the prevailing party" -- is altered by the application of Rule 68. Thus, the 1938 Advisory Committee which drafted Rule 54 was quite explicit that it intended for the Rule to be read harmoniously with, inter alia, former section 830 (currently section 1920) of Title 28, F.R.Civ.P. 54(d), Notes of Advisory Committee, a statute which, as this court has recently noted, defines "costs" as not including attorneys fees, Roadway, supra. Moreover, one of the authorities cited by the 1938 Advisory Committee as descriptive of "the present rule [governing costs] in

common law actions," see F.R.Civ.P. 54(d), Advisory Committee Notes, specifically recognized that, "In the federal courts, the practice is based upon the fundamental, essential, and common law doctrines and distinctions as to costs and fees." Payne, Costs in Common Law Actions in the Federal Courts, 21 Va. L.Rev. 397, at 381-398, 404-405, (1935) (emphasis in original). This "contemporaneous understanding" of the cost-fee distinction is, of course, strong evidence that the unmodified use of the term "costs" by Rule 54's drafters was advised, and was not intended to include fees. Delta Air Lines, Inc. v. August, 450 U.S. 346, 377 (1981) (Rhenquist, J., dissenting).

Moreover, several courts have gone so far as to specifically hold that § 1988 attorneys fees are not the sort of "costs" taxable under Rule 54(d), and have, as a result, sharply distinguished

between the procedural rules applicable to fee prtitions on the one hand and bills of cost on the other. Thus, for example, several courts have held that fee petitions are not subject to local rule time limits governing the filing of bills of costs. See, e.g., Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982); Brown v. Palmetto, 681 F.2d 1325 (11th Cir. 1982); Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982); cf. Seyler v. Seyler, 678 F.2d 29 (5th Cir. 1982) (an application for appellate fees is not subject to the 14-day time limit in Rule 39 of the Fed. R. App. P. applicable to appellate costs).* Similarly, it is

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* In fact, this Court has apparently endorsed this distinction with its observation that "district courts remain free to adopt local rules establishing

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well established that, when it exists, a party's right to attorneys fees is a right to something above and beyond Rule 54 "costs" which is independently actionable and, thus, not dependent Rule 54's provision for the taxation of "costs." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).

Indeed, this distinction between Rule 54(d) "costs" and § 1988 "fees" is compelled by § 1988's legislative history and by this Court's decisions as

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claims for attorney's fees." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 454 (1982) (footnote omitted). See also, e.g., Baird v. Bellotti, 724 F.2d 1032, 1037 & n.6 (1st Cir. 1984); Metcalf v. Borba, 681 F.2d 1183, 1187-88 (9th Cir. 1982); White v. New Hampshire Department of Employment Security, 679 F.2d 283, 285 (1st Cir. 1982); Obin v. District No. 9, Int'l Association of Machinists, 651 F.2d 574, 583 (8th Cir. 1981); Knighton v Watkins, 616 F.2d 795, 798 n.2 (5th Cir. 1980).

to the statute's operation. The contrary rule -- treating fees as an item of Rule 54(d) costs in civil rights actions -- would make fees taxable "as a matter of course" not only on the part of prevailing plaintiffs, but also on the part of prevailing civil rights defendants. Such a result was manifestly not intended by Congress, which was careful to explain that § 1988 fees would not "ordinarily" be awarded to prevailing defendants, and that a civil rights plaintiff "could be assessed with his opponent's fees only where it is shown that his suit was clearly frivolous, vexatious or brought for harrassment purposes." S. Rep. No. 1011, 94th Cong. 2d. Sess. 5 (1976) Reprinted in 1976 U.S. Code Cong. & Ad. News, 5012. Since this standard was squarely endorsed by this Court in Hughes v. Rowe, 449 U.S. 5, 14-16 (1980), see also Christiansberg

Garment Co. v. EEOC, 434 U.S. 412 (1978) (Title VII attorneys fees), a reading of Rule 54(d) which includes fees among Rule 54 "costs" is foreclosed.* Because there is nothing to indicate that Rule 68 "costs" were intended to be different from Rule 54 "costs." Rule 68 should be read consistently with Rule 54, and its terms should not be construed in a manner which shifts responsibility for § 1988 attorneys fees.

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* Indeed, the courts of appeals have uniformly held that losing civil rights plaintiffs whose lawsuits were not frivolous, unreasonable or without foundation, cannot be held liable for the winners' fees though they are presumptively liable for the winners' Rule 54(d) costs. See, e.g., Wrighten v. Metropolitan Hospitals, 726 F.2d 1346 (9th Cir. 1984); Cross v. General Motors Corp., 721 F.2d 1152 (8th Cir. 1983); Moore v. Hughes Helicopters, Inc., 708 F.2d 492 (9th Cir. 1983); Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982); P. Mastrippolito and Sons, Inc. v. Joseph, 692 F.2d 1384 (3d Cir. 1982); Delta Air Lines, Inc. v. Colbert, 692 F.2d 489 (7th Cir. 1982); Montgomery v. Yellow Freight System, Inc., 671 F.2d 412 (10th Cir. 1982);

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Notwithstanding the two hundred years of precedent distinguishing between costs and fees, petitioners and amicus, the Solicitor General, argue that the plain meaning of the term "costs" was altered by Congress' enactment of the Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988. As the Solicitor General's Brief acknowledges, however, the inference that a statutory provision works an "'abrogation' of a [Federal] [R]ule [of Civil Procedure] is 'inappropriate' absent a 'clear expression of Congressional intent.'" Amicus Br. at 28, paraphrasing

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Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981); Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981); see also, Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984); Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983); cf. Baez v. United States Department of Justice, 684 F.2d 999 (D.C. Cir. 1982) (en banc) (same rule as to appellate costs under Rule 39 of the Fed. R. App. P.).

In re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1134-1135 n.50 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1980). Section 1988 contains no "clear expression of [Congressional] intent" sufficient to "abrogate" the plain meaning of Rule 68.

B. The Plain Meaning of Rule 68 was not Abrogated by the Statutory Formula Employed in § 1988.

The argument that Rule 68 costs include § 1988 attorneys fees rests on the happenstance characterization of such fees as "part of the costs" to be awarded a prevailing party in a civil rights action. No legislative history has been cited -- and none exists -- to suggest that this particular statutory formula was intended to have the effect urged. Indeed, the only effect intended by Congress through its use of the "part of the costs" formula was to give § 1988

the broadest possible application by circumventing potential Eleventh Amendment problems in civil rights claims brought against the states. As the Fifth Circuit has concluded, "the legislative history makes clear that this was done for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against Government officials acting in their official capacity." Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980), modified on other grounds on rehearing, 636 F.2d 942 (5th Cir. 1981). See, also, S. Rep. No. 1011, 94th Cong., 2d Sess. 5 n.6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 n.14 (1976); see generally Hutto v. Finney, 437 U.S. 678 (1978). Thus, it is not surprising that, as the Solicitor General candidly admits, he does "not contend that Congress chose this

language specifically envisioning its effect in conjunction with Rule 68." Amicus Br., at 9-10.

But if Rule 68, in the absence of the § 1988 formula, has a clear and unambiguous meaning which does not include attorneys fees, then it is impossible to see how the inadvertant interplay between the statute and the rule evidences the "clear expression of Congressional intent" which is required to "abrogate" that meaning.* Indeed, there are strong reasons for doubting that any such intent -- clear or otherwise -- is inferable.

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* Petitioners also argue that "costs," as the term was used by the drafters of Rule 68, was intended to include fees because, at the time of its formulation, there were numerous statutes which authorized attorneys fees "as part of costs." The argument, apparently, is that because "costs" as used in Rule 68 was not given an express definition at any point in the Federal Rules, it therefore has no independent meaning at all, functioning instead as a kind of placeholder whose

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Section 1988 was enacted to encourage the prosecution of meritorious civil rights claims and, as such, it is "acutely sensitive to the merits of an action and to antidiscrimination policy." Roadway, 447 U.S. at 762, 100 S.Ct. 2455. The use of the "parts of costs" formula was merely intended to further this end. Hutto, supra. In contrast, Rule 68 was

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whose value changes depending on the cause of action being litigated. For the reasons already given, the notion that there was, in 1938, some sort of ambiguity as to whether or not "costs," absent express statutory provision to the contrary, included fees is absurb. The fact that Congress, as of 1938, had enacted numerous pieces of legislation in which the definition of "costs" had been expressly expanded, shows, if anything, that Congress was quite aware of the difference between costs and fees and that it was careful to state that "costs" included fees when that is what it meant. Thus, the background of attorneys fees statutes which colors Rule 68 suggests that Rule 68 costs include traditional costs and nothing else. If Congress had meant to expand the scope of the term, it would have done so explicitly as it had on so many other occasions.

not enacted for this purpose, but solely in order to foster settlement of disputes. Delta Air Lines v. August, 450 U.S. 346, 352 (1980). The notion that Congress inended to expand the scope of a rule intended to serve one purpose when it was drafting statutory language intended to serve a wholly different purpose is dubious at best. Indeed, carried to its logical conclusion, the argument presented to this court would "result in virtually random application of [Rule 68] on the basis of other laws that do not address the problem" of fostering the settlement of disputes. Roadway, 447 U.S. at 761-762. This Court has resoundingly rejected such invitations to "standardless judicial rulemaking" in previous fee cases. Id. It should do so again here.

The "random" and "standardless" character of petitioners' approach is evident from the appendix attached to

the Solicitor General's Brief. There it is revealed that, if Rule 68 "costs" are permitted to include fees on the basis of the underlying statutory formulae, fees will be shifted under the Rule in most civil rights cases, but not in fair housing litigation. 42 U.S.C. § 3612(c) (costs listed separately from fees). Similarly, fees will shift under Rule 68 in actions involving stock manipulation and false securities filings, 15 U.S.C. 78i(e), 78r(a), ("costs (including attorneys fees)"), but not in actions arising from other material misrepresentations made in connection with securities transactions. Or, again, Rule 68 will apply to fees in Magnuson-Moss warranty actions, 15 U.S.C. § 2310(d), but not in diversity actions brought under the warranty provisions of the Uniform Commercial Code. It is impossible to infer any deliberate decision as to the proper scope of Rule 68 from such a crazy quilt of fee-shifting.

In short, the plain meaning of "costs" as that term is used in Rule 68 precludes an application of the Rule to cut off a successful civil rights plaintiff's right to attorneys fees. Section 1988's characterization of such fees as "part of costs" does not constitute the sort of "clear" Congressional intent that is required to alter Rule 68's plain meaning.

II. The Construction of Rule 68 Urged by Petitioner Would Raise Serious Constitutional Questions about the Separation of Powers by Eviscerating § 1988 without Materially Enhancing the Policy Served by Rule 68.

In addition to being contrary to its plain meaning, the construction of Rule 68 urged by petitioner puts that Rule squarely in conflict with the policy determinations embodied by Congress in § 1988. For reasons set forth above, this conflict between statute and rule is not required by the plain language of either. Neither is it required by the

policy underlying Rule 68, since thoughtful judicial application of Section 1988 will suffice to assure that its fee award provisions do not insulate plaintiffs from the need to be realistic participants in the settlement process. In the absence of any compelling need to read Rule 68 in a way which conflicts with § 1988, this Court's authority to do so must be viewed as highly suspect under traditional separation of powers doctrine. Accordingly, for this reason as well, the construction of Rule 68 urged by petitioners cannot be accepted.

A. The Construction of Rule 68 Urged by Petitioners Would Eviscerate § 1988.

The policy underlying § 1988 is no mystery. It is, "to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley v. Eckerhart, ____ U.S. ____,

103 S.Ct. 1933, 1937 (1983). In consequence, the presumption is that a successful civil rights plaintiff will "ordinarily" be entitled to recover reasonable fees, and this presumption will only be overcome under "special circumstances." Hensley, supra, quoting S.Rep. No. 1011, at 4(1976), 1976 U.S. Code Cong. & Ad. News 1976, 5912. Moreover, because the primary focus of the statute is plaintiff's ability to gain access to the courts, prevailing defendants receive § 1988 fees only if plaintiff's suit was "frivolous, unreasonable, or without foundation." Hughes, 449 U.S. at 14-16, see also Christiansburg Garment, 434 U.S. 412, (1978). The proposed construction of Rule 68 undermines this statutory scheme by seriously diminishing the incentives that Congress created for the purpose of attracting competent counsel to the civil rights area, and it devastates

that scheme by grotesquely expanding the circumstances under which civil rights defendants will be able to levy personally against plaintiffs to recover their fees.

Rule 68 cuts off a prevailing party's right to costs -- and, under petitioner's theory, fees -- not only where an offer of judgment is unreasonably rejected, but in any situtation where the offer turns out to be better than the ultimate recovery:

> It deprives a district court of its traditional discretion under Rule 54 to disallow costs to the prevailing party in the strongest verb of its type known to the English language -- "must".

Delta, 450 U.S. at 369. Thus, it makes no difference to the Rule's application if, between the date of the offer and the date of judgment, the law has changed, new and unexpected facts have come to light, a crucial witness changes his or her testimony, there is a change of coun-

sel, there is a change of judge, a jury behaves quixotically or any one of the million and one other things which can and do affect the course of a lawsuit occur. Regardless of the reasonableness of the offer at the time, the Rule is unbending in its application.

But compensation under § 1988 must be at a level "adequate to attract competent counsel," Hensley, 103 S.Ct. at 1938 n.4; S.Rep. No. 1011, at 6. The mechanical application of Rule 68 mandated by its language would surely "cut across the grain" of this goal if, as petitioners urge, Rule 68 "costs" are deemed to include fees. Under this arrangement, any counsel faced with a Rule 68 offer is immediately put in the insufferable situation of staking his compensation for any post-offer work on the hope that his projections about the events likely to take place throughout the life of a law-

suit turn out to be correct. Moreover, where the offer comes at an early point in the litigation and before any significant discovery, these projections are, at best, partially informed. Under such circumstances, the attorney is either forced to gamble his wage on the hope that the sealed book of defendant's records and witnesses -- a book fully known to the defendant-offeror -- will back up the attorney's preliminary findings, or the attorney is forced to advise his client to surrender a potentially valuable claim because of the attorney's fear that he will not recover fees sufficient to justify its vigorous prosecution.

This glum picture becomes even bleaker when the proposed construction of Rule 68 is examined from the perspective of the plaintiff himself. Rule 68 provides not only that the offeree loses his right to recover post-offer costs

when settlement is improvidently rejected, but also that "the offeree must pay the costs incurred after the making of the offer." The courts that have considered the question have unswervingly held that, as this language plainly implies, a plaintiff who rejects but does not better an offer of judgment is saddled with responsibility not only for his own costs, but for defendant's as well. Liberty Mutual Insurance Co. v. EEOC, 691 F.2d 438, 442 (9th Cir. 1982); Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D. N.Y. 1974). If, as petitioner urges, Rule 68 "costs" include attorney's fees in civil rights cases, the potential liability for a civil rights plaintiff of modest means in a lawsuit of any complexity may well be ruinous. See Delta, 450 U.S. at 378 (Rehnquist,

J., dissenting)* Under such circumstances, most plaintiffs would be effectively powerless to reject even grossly undervalued offers of judgment, giving civil rights defendants virtual carte blanche to dictate the terms on which

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* The Solicitor General argues, Amicus Br., at 8 n.3, that, because the Delta decision mandates that Rule 68 only comes into play when plaintiff actually receives a judgment in an amount less than the offer, a defendant-offeror will never be a "prevailing party" under § 1988 and, thus, never entitled to receive fees under that statute. The same argument, however, would suggest that Rule 68 does not entitle defendants to post-offer costs, as Rule 54(d) awards costs only to "prevailing parties." The authorities cited in the text above establish that this is not the case. Indeed, the whole point of Rule 68 is to shift the burdens and entitlements between prevailing and non-prevailing parties during the post-offer period and what is at issue here is precisely whether the post-offer cost shifting effected by the Rule includes the parties' responsibilities with respect to § 1988 fees. Amicus cannot have it both ways. Either Rule 68 shifts fees or it does not. There is no basis in the Rule's language and its judicial gloss for arguing that an offeree can be denied his post-offer costs without simultaneously assuming responsibility for the offeror's costs.

such lawsuits are resolved. The proposed construction of Rule 68 would, thus, effectively transform § 1988 from a key which opens the courtroom door to a lock which bars entry.

B. The Rule Urged by Petitioners Will not Materially Enhance the Policies Served by Rule 68.

Petitioners and the Solicitor General argue that, whatever the potential disincentives to vigorous prosecution of the civil rights laws created by their proposed construction of Rule 68, this construction is required to serve the end of fostering settlement in these matters, and, in any event, that "Section 1988 is not an unqualified, single-minded provision intended to override any policies that stand in its way." Amicus Br., at 15. Thus, much is made of the fact that, in this case, the post-offer fees of plaintiff's counsel ex-

ceeded $100,000. Amicus Br., at 17. This argument, however, ignores the fact that a plaintiff is not automatically entitled to recover all of the fees requested by his attorney. Indeed, this plaintiff's attorney in this case has not yet become entitled to any post-offer fees because the trial judge has not yet ruled on any such request. Rather, like any other prevailing party, plaintiff here will only recover post-offer fees to the extent that the trial court finds them "reasonable."

It is well established that one of the "important" considerations examined by a court in determining a "reasonable" § 1988 fee is "the result obtained." Hensley, 103 S.Ct. at 1940. Consistent with this standard, where a plaintiff unreasonably rejects a settlement offer incurring considerable expense to no productive end, it is only to be

expected that the court which determines plaintiff's fee award will take any unproductive recalcitrance into account.

This case, however, offers no insight as to the relevancy of such considerations to a fee determination. No record exists at this point to indicate that plaintiff's rejection of the offer was in the least unreasonable or that his counsel's post-offer work was all unproductive.

What is clear is that application of Rule 68 to the facts of this case -- whatever they may turn out to be -- is precisely the wrong way to factor such considerations into a fee determination. Petitioners are, essentially, recommending that Rule 68 be construed as creating a sort of per se standard for determining whether or not plaintiff's post-offer fees are "reasonable." Such ironclad rules have never been applied

in § 1988 decisions. Instead the standard has always been that, "the amount of the fee . . . must be determined on the facts of each case," Hensley, 103 S.Ct. 1937, and Congress has repeatedly and specifically declined to jettison this flexible attitude towards evaluation of a plaintiff's settlment posture for the mechanical fee shifting urged by Petitioners.*

Such repeated Congressional refusals to act are normally given great weight in construing a statute's meaning.

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* The first bill seeking to impose a mechanical application of § 1988 in connection with rejected settlement offers was introduced by Senator Orrin Hatch as S. 585, 97th Cong., 1st Sess. (1981). That bill provided in § 2(c) that:

> No fee shall be awarded under [§ 1988] as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the

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E.g., Bob Jones University v. United States, ____ U.S. ____, 103 S.Ct. 2017, 2032-2034 (1983). Here, particularly when taken in conjunction with all of the other indices of Congressional intent discussed above, Congress' continuing refusal to alter § 1988 in the manner proposed by petitioners strongly suggests that the policies favoring settlement do not mandate the rule of law proposed.

In short, Petitioner's construction of Rule 68 is anathema to the congressionally determined polices em-

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relief ultimately awarded by the court.

Two sets of hearings were held on S. 585. Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitu-tion of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Se-

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nate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981). The legislation was never voted out of subcommittee.

Early in the next Congress, Senator Hatch introduced S. 141, 98th Cong., 1st Sess. (1983). That bill, contained provision identical to § 2(c) of S.585. Although hearings on S. 141 have been repeatedly scheduled and postponed, none have actually been held. The legislation has not been voted out of subcommittee.

In June, 1984, Senator Strom Thurmond introduced S. 2802, 98th Cong., 2d Sess. (1984); see generally ____ Cong. Rec. S8842-55 (daily ed. June 29, 1984) (statement of Sen. Hatch). An identical bill was introduced in the House by Representative Hamilton Fish, H.R. 5757, 98th Cong., 2d Sess. (1984). This legislation, titled the "Legal Fees Equity Act," is directed at not only § 1988 but every federal fee-shifting statute that authorizes fee recovery against federal, state or local governments or their officials. Section 8(2) of the legislation provides that:

> Sec. 8. No award of attorney's fees and related expenses subject to the provisions of this Act may be
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> made --

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bodied in the Attorneys Fee Awards Act, and it is not required by the general policy favoring settlement. Because the construction imposed would create a conflict between a court created rule

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> (2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that --
>
> (A) the relief finally obtained by the party is not more favorable to the party than the offer of settlement, and
>
> (B) the failure of the party to accept the offer of settlement was not reasonable at the time such failure occurred.

Senate hearings were held on September 11, 1984. Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984). Like the Hatch proposals, this legislation has not been voted out of subcommittee.

and a congressionally enacted statute, traditional separation of powers concerns dictate that the conflict should be resolved in favor of the Congress' considered decision.

C. The Rule Proposed by Petitioners Raises Serious Separation of Power Problems.

This Court's authority to formulate rules governing attorneys fees has two potential sources: its "inherent" powers, see Roadway, 447 U.S. at 764-767, and the powers delegated to it under the Rules Enabling Act. 28 U.S.C. § 2071-2072. Since this Court's decision in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975), it has been clear that the long history of congressional activity in this area establishes that the decision of when to award attorneys fees to a prevailing party is "a policy matter that Congress has reserved for itself." 421 U.S. at 269. Accordingly, bowing to the most

fundamental of separation of power doctrines, this Court there declined "to invade the legislature's province by redistributing litigation costs." 421 U.S. at 271. Because § 1988 was enacted by Congress as a direct response to the Alyeska decision, S. Rep. No. 1011, at 4, the very logic of that opinion bars an exercise of this Court's inherent powers to construe Rule 68 in a manner which devastates the intended effect of that statute.

Nor is the proposed construction of Rule 68 a proper exercise of the power delegated under The Rules Enabling Act. The rulemaking authority delegated by the Rules Enabling Act is limited.* It

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* Indeed, in light of this Court's ruling in Chadha v. INS, _____ U.S. ___, 103 S.Ct. 2764 (1983), there is reason to doubt that mere Congressional inaction during the "laying over" period mandated by § 2072 is sufficient to vest any rule with any greater authority than the rule would enjoy by reason of this Court's inherent powers.

specifically subordinates this Court's rulemaking authority to Congress' considered policy decisions, requiring, in its first section, that rules formulated by the courts, "shall be consistent with Acts of Congress . . ." 42 U.S.C. § 2071. This limitation is echoed and underlined by the requirement, imposed in the Act's second section that, "Such rules shall not abridge, enlarge or modify any substantive right . . ." 42 U.S.C. § 2072. As the Solicitor General's Brief makes clear, this latter provision is most properly construed as referring "to the allocation of authority between Congress and the Court." Amicus Br., at 25.

Here, far from being "consistent" with § 1988, the construction of Rule 68 commended by petitioners would overstep the "allocation of authority between Congress and the Court" set out in Alyeska, by upsetting the carefully considered

policy balance effected by § 1988. Accordingly, in construing Rule 68, separation of powers doctrine requires that, to the extent the two are in conflict, Rule 68 must be subordinated to § 1988. A fortiori, this means that petitioners' construction of Rule 68 must be rejected.

III. An Offer of Judgment which Includes both Plaintiff's Damages and Plaintiff's § 1988 Attorneys Fees is not Proper for the Purposes of Rule 68.

Even if the plain language of Rule 68 and the strong policies underlying § 1988 did not require it, there is a third reason why the ruling of the Court of Appeals must be affirmed in this case: the offer of judgment made by petitioner was not a valid or proper one under Rule 68. The offer of judgment made in this case included in one lump sum the amount that was to be paid plaintiff to compensate him for his injury, his costs, and his attorneys fees to the

date of the offer. Such an offer of judgment is improper first, because it is so uncertain as to be useless for Rule 68 purposes; and, second, because this same uncertainty creates a conflict of interest between the offeree and his lawyer.

A. An Offer of Judgment which Includes § 1988 Attorneys Fees is too Uncertain to be Valid Under Rule 68 Purposes.

An Offer of Judgment, in order to be valid under Rule 68, must specify a determinate recovery to be realized by the offeree-plaintiff. The general practice has been capsulized by a leading commentator:

"To be within Rule 68, the offer of judgment must be unconditional. Thus an offer which is subject to the provisions of an instrument which can only be determined by judicial action is not such an offer. Nor is an offer that does not include money damages prayed, but only consents to the plaintiff having the equitable relief demanded, such an offer. The offer must be specific as to the sum to be entered as judgment, and an offer which fails to specify a definite sum

which can be either accepted or rejected will not preclude a court's consideration of the offeree's costs thereafter incurred."

Moore's Federal Practice, ¶68.04, at 68-9 (citations ommitted).

The basis for this requirement is obvious: absent a concrete offer which the plaintiff "can accept or reject" it is impossible for the plaintiff to make a knowing evaluation of the likelihood that the offer can be bettered by trying the case on its merits. Accordingly, the significance of the "inducement" to settlement created by the offer, see, Delta, 450 U.S. at 352, will be impossible to assess. Where, as here, the offer of judgment includes § 1988 attorneys fees in one lump sum with the amount to be paid to the plaintiff personally, the plaintiff cannot meaningfully evaluate the worth of the offer.

Plaintiff's net recovery from an offer lumping fees and damages will

be the total amount of the offer less his attorney's "reasonable" § 1988 fees. Thus, his ability to assess the offer turns on his ability to assess his attorney's "reasonable" § 1988 fees. Any such estimation, however, is inherently so uncertain as to be meaningless.

As this Court has recently noted, § 1988 fees are awarded on the basis of 12 interrelated factors, Hensley, 103 S.Ct. at 1937 n.3, whose evaluation "may lead the district court to adjust the [total hourly] fee upward or downward." Id., at 1940. This delicate calculation is largely discretionary with the district court, id., at 1941, which, "is not bound by the prevailing party's attorney's proposed hourly rate or by the bill submitted. The fee itself must be reasonable." Delta, 450 U.S. at 365 (Powell, J., concurring). As a consequence, "neither the plaintiff nor

the defendant can know with any degree of certainty how much of the attorney's fees a prevailing plaintiff seeks will be allowed by a trial court exercising its discretion..." Id., 450 U.S. at 379 n.5, (Rehnquist, J., dissenting).

In short, when faced with an offer like the one here at issue, a plaintiff is required to bear not only the burden of the normal Rule 68 offeree -- that he forecast as to the likely outcome of the lawsuit -- but also the burden that he prognosticate as to the value of the very settlement proposed to him. A Rule 68 offer entailing such double speculation is identical to an offer whose terms "are subject to the provisions of an instrument which can only be determined by judicial action." Moore, supra. As in that situation, the value of this offer turns on a highly discretionary and unpredictable judicial determination.

Because the plaintiff has no idea of the value to him personally of the proposed judgment, such offers are meaningless as a basis for settlement, and therefore improper under Rule 68. Moore, supra.

Notwithstanding this problem, it has been contended that the double speculation that faces such an offeree is equally a problem for the offeror, and that the objective of a Rule 68 offer of judgment is to give the defendant-offeror an opportunity to fix his total exposure for both damages and fees. Absent an oportunity to simultaneously fix both sums, it is argued, defendants will be unwilling to employ Rule 68 to settle the damages aspect of a civil rights claim, for this will only mean that they will still be faced with potentially "open-ended" liability for fees. See Delta, supra.

The policy underlying Rule 68 -- encouraging the settlement of lawsuits -- does not, however, require this result. If it is in fact the case that defendants make offers of judgment -- or, for that matter, settlement offers of any sort -- in order to avoid the risk that a trial on the merits will expose them to excessive liability for damages and fees, it is equally the case that plaintiffs accept offers of judgment to avoid the converse risk that a trial on the merits will not improve their net recovery. But if the incentive for both parties entering into the settlement process is the elimination of risk and uncertainty, the fact that this type of Rule 68 offer decreases defendant's uncertainty while simultaneously increasing plaintiff's means that the overall incen-

tives for <u>both</u> parties to settle have not changed.* Thus, the policy considerations underlying Rule 68 do not require that defendants be permitted to make offers of judgment lumping § 1988 fees with damages and costs. Since the uncertainty inherent in such an offer makes it unworkable for Rule 68 purposes, it is invalid.

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* In the same vein, it should be recognized that a plaintiff is in no better a position to eliminate the uncertainty as to what level of fees the court will find "reasonable" than is defendant. While it is true that the plaintiff will know the amount of time his attorney has spent on the case and his attorney's normal hourly rate, defendant will normally be fully aware of the customary rate for comparable legal work in the community and he will have his own attorney's time as an index of the number of hours "reasonably" required to handle the case. Neither plaintiff nor defendant, of course, will be any better off in predicting how the court is likely to exercise its discretion in adding to or subtracting from the "lodestar" rate times hours figure.

B. An Offer of Judgment which Includes Attorneys Fees is Unethical and Creates a Conflict of Interest Between Plaintiff and his Lawyer.

While there will undoubtedly be exceptions, normally an offer of judgment which includes attorneys fees and damages in one lump sum, places plaintiff's lawyer in an insoluble conflict of interest. In order to advise his client intelligently whether to accept the offer, the lawyer will be required both to assess the likely result of a trial on the merits and to assess the likely disposition of his petition for "reasonable" § 1988 attorneys fees. As a practical matter, however, the real party in interest with respect to § 1988 fees is the attorney, see, e.g., Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978), who will, therefore, have a strong pecuniary interest in maximizing his estimate of the fees to which he is "reasonably" entitled.

But when he is advising a client about the value of a Rule 68 offer which includes both fees and damages, every dollar that the attorney allocates to his fee claim is a dollar subtracted from the plaintiff's net recovery. Thus, inevitably, there is a direct conflict between counsel's and client's interest in counsel's advice on this point.* An offer of judgment which creates such a conflict cannot be proper.

Indeed, fear of precisely this conflict has led numerous courts to dis-

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* It is this conflict which distinguishes cases where the attorney's contingent fee is determined as a matter of judicial discretion from the classic contingent fee situation discussed by the court below, where the attorney's fee is determined by contract as a fixed percentage of plantiff's recovery. Under the fixed percentage arrangement, the attorney's "slice of the pie" is established by mutual agreement between attorney and client. In the Rule 68/§ 1988 situation, in contrast, the danger is that the allocation between attorney and client will be determined by the attorney's self interested advice.

approve other settlement arrangements which lump together fees and damages. Prandini v. National Tea Company, 557 F.2d 1015 (3d Cir. 1977); Lisa v. Snider, 561 F.Supp. 724 (N.D. Ind. 1983); See also Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980); Obin v. District No. 9, supra, 651 F.2d at 582; Benitz v. Collazo, 571 F.Supp. 246, 250 (D.P.R. 1983); Jones v. Orange Housing Authority, 559 F.Supp. 1379 (D.N.J. 1983); 80 F.R.D. 665 (D.Ariz. 1978); Regalado, supra. Accord: Delta, supra, 450 U.S. at 364, 101 S.Ct. at 1156 (Powell, J., concurring). Cf., Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of The New York City Bar Association, 36 Record of N.Y.C.B.A. 507 (1981) (Holding that it is a breach of professional ethics for defendant to condition settlement on the merits on full or partial waiver of statutory attorneys fees). See also,

Manual for Complex Litigation, reprinted in 1, Pt. 2, Moore's Federal Practice, 1.46, at 74 ("When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."). Where a Rule 68 defendant does not know the nature of the fee arrangement between plaintiff and his counsel, an offer of judgment which combines these items inherently runs the risk of creating the very conflict which had so unequivocally and so consistently been disapproved by these courts.*

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* Since petitioners acknowledge that they first learned the terms of the contingent fee arrangement in this case on appeal, Petitioner's Brief, at 37, the fact that this fee agreement happened to be drafted in a way which circumvented this conflict does not eliminate the risk run by Petitioners at the time they made their offer. Certainly it does not eliminate that risk from future Rule 68 cases; nor does it eliminate the certainty that, in a certain percentage of such cases, this risk will be realized.

This does not, of course, mean that such offers will inevitably result in conflicts of interest. Nor, as this Court has noted, does it necessarily mean that counsel will never be able to cope with those conflicts which do arise. White, 102 S.Ct. at 1167 n.15. What it does mean is that the risk of such conflicts is inevitable under Petitioners' proposed rule, as is the risk that counsel will be unable or unwilling to ameliorate the conflicts which do come to pass. Surely a rule which positively invites and encourages unethical behavior is not one to be willingly embraced so long as some alternative exists. For all of the reasons previously discussed, an alternative does exist to the construction of Rule 68 urged by petitioners. That alternative should be adopted.

CONCLUSION

For all of the foregoing reasons, amici ACLU and ACLU of Illinois respectfully request that this Court affirm the decision of the Court of Appeals.

RESPECTFULY SUBMITTED,

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